

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>SERGE ZENIN</b>	:	DETERMINATION
	:	DTA NO. 821830
for Revision of a Determination or for Refund of	:	
Cigarette Tax under Article 20 of the Tax Law for the	:	
Period Ended February 24, 2006.	:	

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Petitioner, Serge Zenin, filed a petition for revision of a determination or for refund of cigarette tax under Article 20 of the Tax Law for the period ended February 24, 2006.

The Division of Taxation, by its representative, Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), brought a motion filed November 13, 2007, seeking dismissal of the petition or, in the alternative, summary determination in the above-referenced matter pursuant to 20 NYCRR 3000.5, 3000.9(a)(1); (b). Petitioner, appearing by Jeff Pearlman, CPA, filed a response to the motion on December 13, 2007, which date commenced the 90-day period for the issuance of this determination. After due consideration of the documents and arguments presented, Brian L. Friedman, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether petitioner filed a timely request for a conciliation conference with the Bureau of Conciliation and Mediation Services following the issuance of a notice of determination.

***FINDINGS OF FACT***

1. The Division of Taxation (Division) issued to Serge Zenin (petitioner), a Notice of Determination, dated November 30, 2006, which was addressed to petitioner at 716 Ocean

Parkway, Apt. 4D, Brooklyn, New York 11230-1120. The notice bore assessment number L-027981965-2 and asserted penalty due in the amount of \$20,100.00 for the period ended February 24, 2006.

2. A letter dated May 22, 2007 from petitioner's representative, Jeff Pearlman, CPA, was sent to "NYS Assessment Receivables" in Binghamton, New York. The letter stated that "[m]y client and I have requested an informal hearing to seek a partial or full [sic] abatement of the penalty issued." This letter was not received by the Division's Bureau of Conciliation and Mediation Services (BCMS) until June 19, 2007.

3. On July 6, 2007, BCMS issued a Conciliation Order Dismissing Request (CMS No. 219883) which denied petitioner's request for a conciliation conference, stating:

The Tax Law requires that a request be filed within 90 days from the mailing date of the statutory notice. Since the notice(s) was issued on November 30, 2006, but the request was not received until June 19, 2007, or in excess of 90 days, the request is late filed.

4. The Notice of Determination was based upon an investigation by the Office of Tax Enforcement of the Department of Taxation and Finance which concluded that petitioner was in possession of 139 cartons of untaxed cigarettes and was arrested by an officer of the Suffolk County Police Department.

5. The Tax Enforcement Referral Report indicated that petitioner's address was 716 Ocean Parkway, Apt. 4D, Brooklyn, New York 11230, which was the address on the Notice of Determination and which was the address set forth on petitioner's petition to the Division of Tax Appeals.

6. Notices of determination like the one at issue herein are computer-generated by the Division's Computerized Case and Resource Tracking System (CARTS) Control Unit. The

computer preparation of such notices also includes the preparation of a certified mail record (CMR). The CMR lists those taxpayers to whom notices of determination are being mailed and also includes, for each notice, a separate certified control number. The pages of the CMR remain connected to each other before and after acceptance of the notices by the United States Postal Service (USPS) through return of the CMR to the Carts Control Unit.

7. Each computer-generated notice of determination is predated with its anticipated mailing date and each is assigned a certified control number. This number is recorded on the CMR under the heading "CERTIFIED NO." The CMR lists an initial date (the date of printing) in its upper left corner which date is approximately 10 days earlier than the anticipated mailing date for the notices. This period is provided to allow sufficient time for manual review and processing of the notices, including affixation of postage, and mailing. The initial (printing) date on the CMR is manually changed at the time of mailing by Division personnel to conform to the actual date of mailing of the notices. In this case, page one of the CMR indicated an initial date of November 20, 2006 ("20063241700" referring to the 324<sup>th</sup> day of the year and time of day expressed on a 24-hour basis, or 5:00 P.M.) which was manually changed to "11-30-06" or November 30, 2006.

8. After a notice of determination is placed in an area designated by the Division's Mail Processing Center for "Outgoing Certified Mail," a staffer weighs and seals each envelope and affixes postage and fee amounts thereon. A Mail Processing Center clerk then counts the envelopes and verifies by a random review the names and certified mail numbers of up to 30 pieces of mail against the information contained on the CMR. Thereafter, a Mail Processing Center employee delivers the stamped envelopes and associated CMR to one of the various branch offices of the USPS located in the Albany, New York, area, in this instance the Colonie

Center branch, where a postal employee accepts the envelopes into the custody of the USPS and affixes a dated postmark and his or her signature or initials to the CMR.

9. In the ordinary course of business, a Mail Processing Center employee picks up the CMR from the USPS on the following day and returns it to the CARTS Control Unit.

10. In the present matter, the CMR is a 22-page, fan-folded (connected) computer-generated document entitled "Certified Record for Presort Mail-Assessments Receivable." This CMR lists 232 control numbers. Each such certified control number is assigned to an item of mail listed on the 22 pages of the CMR. Specifically, corresponding to each listed certified control number is a notice number, the name and address of the addressee and postage and fee amounts.

11. Information regarding the Notice of Determination issued to petitioner is contained on page 13 of the CMR. Corresponding to certified control number 7104 1002 9730 1673 4711 is notice number L-027981965, along with petitioner's name and address (716 Ocean Parkway, Apt. 4D, Brooklyn, NY 11230-1120) which is identical to that listed on the Tax Enforcement Referral Report.

12. Each page of the CMR bears the postmark of the Colonie Center Branch of the USPS, dated November 30, 2006, and the initials of the postal employee, verifying receipt of the items.

13. The last page of the CMR, page 22, contains a preprinted entry of "232" corresponding to the heading "Total Pieces and Amounts." A stamp appears on page 22 of the CMR which directs the post office to "[h]and write the total # of pieces and initial." To the right of the stamp is the handwritten number "232" and the initials of the postal employee along with a postmark of the Colonie Center Branch of the USPS bearing the date of November 30, 2006.

14. The affixation of the USPS postmark, the initials of the USPS employee and the handwritten “232” indicate that all 232 pieces listed on the CMR were received at the post office.

15. In the ordinary course of business, the Division generally does not request, demand or retain return receipts from certified or registered mail.

16. The facts set forth in Findings of Fact “6” through “15” were established through the affidavits of Patricia Finn Sears and James Steven VanDerzee, each sworn to on November 8, 2007. Ms. Sears is employed as the supervisor of the Division’s CARTS Control Unit and her duties include supervising the processing of notices of determination. Mr. VanDerzee is employed as a Mail and Supply Supervisor in the Division’s Registry Unit. His duties include supervising Mail Processing Staff in delivering outgoing mail to branch offices of the USPS.

17. On August 7, 2007, petitioner filed a petition with the Division of Tax Appeals seeking an administrative hearing to review the Conciliation Order dated July 6, 2007.

#### ***SUMMARY OF PETITIONER’S POSITION***

18. In response to the Division’s motion, petitioner contends that he never received the statutory notice purportedly sent by the Division on November 30, 2006 and points to the fact that there is no acknowledgment that petitioner or any other party at the designated address signed for this piece of mail.

19. Attached to petitioner’s response to the Division’s motion is a copy of a Notice and Demand for Payment of Tax Due dated March 22, 2007 (Assessment No. L-027981965-2) in the amount of \$20,100.00. Petitioner’s representative asserts that upon receiving the notice and demand, he contacted the Division, spoke to employee who advised him “to file for an informal protest to the conciliation conference.”

20. A letter dated April 10, 2007 was sent by petitioner's representative to "NYS Assessment Receivable, GPO Box 4128, Binghamton, NY 13902-4128" which stated that "I am filing an informal protest on the penalties imposed on the purchase of untaxed cigarettes."

21. Petitioner contends that he was not timely advised of his rights to file a protest to the imposition of the penalty at issue in this proceeding.

### ***CONCLUSIONS OF LAW***

A. A motion for summary determination shall be granted:

if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party (20 NYCRR 3000.9[b][1]).

B. Here, petitioner's response to the Division's motion was an affidavit of his accountant, Jeff Pearlman, who denied that petitioner ever received the Notice of Determination issued by the Division. No evidence was presented by petitioner to contest the facts alleged in the Sears and VanDerzee affidavits and the address set forth on the Tax Enforcement Referral Report which was subsequently utilized by the Division in the issuance of the Notice of Determination. Accordingly, these facts are deemed admitted (*see Kuehne & Nagel, Inc. v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667, 671 [1975]; *Whelan v. GTE Sylvania, Inc.*, 182 AD2d 446, 582 NYS2d 170, 173 [1992]). Upon all the proof presented, and for the reasons hereinafter stated, it is concluded that there is no material and triable issue of fact presented and that the Division is entitled to a determination in its favor.

C. Tax Law § 478 authorizes the Division of Taxation to issue a notice of determination to a taxpayer subject to tax under Article 20 of the Tax Law if a return required under Article 20 is incorrect or insufficient. Pursuant to this section, the determination "shall finally and irrevocably

fix the tax” assessed by such notice, unless the person against whom it is assessed files a petition with the Division of Tax Appeals seeking revision of the determination within 90 days of the mailing of the notice. As an alternative to filing a petition with the Division of Tax Appeals, a taxpayer may request a conciliation conference in BCMS within the same time period of 90 days (Tax Law § 170[3-a][a]). The filing of a timely petition or request for a conciliation conference is a jurisdictional prerequisite which, if not met, precludes the Division of Tax Appeals from hearing the merits of a case (*Matter of Cato*, Tax Appeals Tribunal, October 27, 2005; *Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002).

D. Tax Law § 481(b) provides the Division with the authority to assess penalties for the possession of unstamped cigarettes and other tobacco products. Penalties imposed pursuant to this statute are to be determined and reviewed in the same manner as that provided in Tax Law § 478.

E. Where, as here, the Division claims that a taxpayer’s protest against a notice was not timely filed, the initial inquiry must focus on the issuance (mailing) of the notice, and the Division bears the burden of proving both the fact and date of mailing (*Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23 ,1991). The mailing evidence required of the Division is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of notices by one with knowledge of the relevant procedures; and, second, there must be proof that the standard procedure was followed in the particular instance at issue (*see Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv., supra*).

F. In this case, the affidavits of two Division employees, Patricia Finn Sears and James VanDerzee, provide adequate proof of the Division’s standard mailing procedure for the mailing

of notices of determination by certified mail. The affidavits generally describe the various stages of producing and mailing notices of determination and establish that the general mailing procedures described in the affidavits were followed with respect to the Notice of Determination issued on November 30, 2006 to petitioner. Petitioner's name, address and the assessment number of the statutory notice appear on page 13 of the CMR, which bears a USPS date stamp of November 30, 2006 along with the initials of the postal employee who received the notices for mailing. There are 232 certified control numbers listed on the CMR and the USPS employee indicated that he received 232 pieces for mailing. The Division has, therefore, established that it mailed the Notice of Determination to petitioner by certified mail on November 30, 2006.

G. When a notice is found to have been properly mailed by the Division, a presumption arises that the notice was received by the person to whom it was addressed (Tax Law § 1147[a][1]). While this statute pertains to sales and use taxes imposed pursuant to Article 28 of the Tax Law, it is applicable to the taxes on cigarettes and tobacco products (*see* Tax Law § 480-a[2][d]). Once this presumption has arisen, the burden is on petitioner to rebut the presumption by introducing evidence of nonreceipt (*Matter of Huggins*, Tax Appeals Tribunal, April 8, 1999).

In the present matter, the response of petitioner's representative to the Division's motion asserts that "[m]y client never received the registered letter." However, unsubstantiated allegations or assertions are insufficient to raise an issue of fact (*Alvord & Swift v. Muller Constr. Co.*, 46 NY2d 276, 281, 413 NYS2d 309, 312 [1978]). In addition, it is well settled that mere denial of receipt will not suffice to rebut the presumption of receipt (*Matter of T.J. Gulf, Inc. v. State Tax Commn.*, 124 AD2d 314, 315, 508 NYS2d 97, 98 [1986]).



H. Petitioner's request for conciliation conference, while dated May 22, 2007, was not received by BCMS until June 19, 2007. Since the Notice of Determination was issued on November 30, 2006, the 90-day period for filing a request for conciliation conference expired on February 28, 2007. Accordingly, since the request was not filed within the statutory 90-day period, the Division of Tax Appeals is without jurisdiction to entertain petitioner's challenge to the Notice of Determination.

I. The Division of Taxation's Motion for Summary Determination is granted and the petition of Serge Zenin is hereby dismissed.

DATED: Troy, New York  
March 13, 2008

/s/ Brian L. Friedman  
ADMINISTRATIVE LAW JUDGE